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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 63.

THE NORTHWESTERN BANDS OF THE SHOSHONE INDIANS,
Petitioners,

v.

THE UNITED STATES.

BRIEF AS AMICUS CURIAE BY THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE PETITION FOR REHEARING.

HUSTON THOMPSON,
General Counsel for The National Congress of American Indians.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT.

The National Congress of American Indians (hereinafter called the Indian Congress) asks that this brief be considered by the Court in connection with the Petition for Rehearing in the above entitled cause.

The Indian Congress is an unincorporated association consisting entirely of American Indians and already numbering more than 50 tribes located in at least 21 different states, with the number constantly increasing and soon expected to include all Indian tribes. The various tribes of

the American Indians, having struggled for the last eighty years to obtain recognition and justice for their rights, and their claims against the Government, and having signally failed to do so, though not because of the lack of splendid support by their friends, have at last been driven to associate themselves in a group movement. To this end the several tribes held its first convention at Denver, Colorado, November 15, 1944, at which over one hundred thousand Indians were represented.

One of the main reasons that forced the creation of this organization has been the desire for reimbursement for lands which member tribes possessed and owned and of which they were dispossessed by the United States.

One of the members of the Indian Congress is the petitioner in this case. Its representatives were present at the Denver meeting. The Executive Council of the Congress in January, 1945, requested its legislative committee to assist the petitioner in its legal procedure before the United States Government, and, the consent of both parties to the above entitled cause having been first obtained, the Indian Congress respectfully submits the following reasons to the Court for granting a rehearing.

REASONS FOR A REHEARING.

1. The Indian Congress supports and adopts as its own the points and authorities in the brief of the petitioners herein.

2. The Indian Congress respectfully submits that the Court of Claims and the majority opinion in this Court has taken too restricted a view of the Special Jurisdictional Act of February 28, 1929, 45 Stat. 1407.

There is no contention here that the Special Jurisdictional Act has infringed upon or limited the general jurisdictional powers granted to the Court of Claims by Congress. Hence, what Congress did in enacting the Special Legislative Act was to superimpose upon the general juris-

diction of the Court the power to eliminate the Statute of Limitations, and in this Special Act, set up a yardstick and marker by which the Court could determine the location and the amount of the acreage involved. With this factor known, it could then determine the fair value of the land taken by the United States.

There can be no question but that the Committees of both Houses of Congress in passing this Special Act were aware of and knew the contents of the Box Elder Treaty of July 30, 1863; that this Treaty contained a map, which together attached to contemporaneous Treaties of other divisions of this tribe, clearly set forth the area involved; that from these maps the Court of Claims could without great difficulty determine the acreage. If the foregoing were not so, Congress would not have made reference in the Special Act to this Treaty.

Moreover, there is no hint in the title or body of the Act that Congress had a doubt as to what the general area of territory was or where it was located. It is, therefore, respectfully submitted that what Congress had in mind was that here were Indians who had had title by possession; that this title had been recognized by Treaty and by acts of Government officials; that Congress by the Special Act was recognizing this title by possession and was desiring the Court of Claims, without any technical limitations, to determine, not the question of title, but the amount and value of the acreage, title to which, and about which, Congress had no question.

Familiar as Congress was with the Box Elder Treaty and associate treaties and with the recognition of title that had been given by representatives of the Department of the Interior and other representatives of the Government, Congress did not intend to raise any question about the Indians' title. On the contrary, it was simply reaffirming the title, and asking the Court to fix the value of the land and enter judgment for it.

Values had been determined by the Court in the past with respect to other Indian lands. Hence Congress would naturally assume that the Court could arrive, not at a minutely accurate figure per acre, but at a fair and general value.

It should be kept in mind that this area was not taken away entirely from the Indians in 1863. There has been a gradual taking, piece by piece, over a number of years.

Only to guide the Court and eliminate the question of title, did Congress make reference to the Box Elder Treaty.

Instead of responding to the Congressional intention, it is respectfully submitted that the lower Court went far beyond this intention in seeking to determine, first of all, whether the Indians had a title, a matter which the Senate had already confirmed and which the special legislation recognized.

3. The Indian Congress is greatly disturbed over the language in the majority opinion as to apparent tests with respect to title. One of them appears to be the number of these Shoshone Indians living at the time of the Treaty, in 1863. It is said that there were about 1,500 to 1,800, and that they claimed ten million acres then, and now claim six million additional.

Title has never before been determined by numbers but by dominance, possession and control of an area. If this new test is adopted, it will set up a dangerous precedent.

4. The language of Mr. Justice Black and Mr. Justice Jackson in concurring with the majority is also disturbing to these Indians. The argument is made, and apparently against the granting of a money judgment, that if such were granted the money would be earmarked in the Treasury and "after counsel are thus paid, not a cent is put into the reach of the Indians;". This may be true for the time being, but two years hence Congress may decide to vote a cash distribution of the judgment money to the Indians.

Congress is constantly changing the status of Indian money in the United States Treasury. For example, it has

restricted the funds derived from the allotments of restricted Indians. It has determined restrictions from time to time by the amount of Indian blood. If an Indian does not possess certain Indian restrictions, his money in the Treasury may cease to be restricted and his allotment no longer exempted from taxation. Again, Congress has placed restrictions on Indian funds and later extended the restriction. Congress can terminate those restrictions at any date and the moneys can be distributed to the Indians.

5. The concurring opinions of Mr. Justice Black and Mr. Justice Jackson would seem to argue that a moral duty is not sufficient or too difficult a basis upon which Congress could legislate funds for the Indians. It would appear in this case that there was not only a moral but a legal duty involved. These Justices admit the moral duty but say that it is unfortunate to try to measure it. However, Congress has the power to legislate funds in favor of a moral obligation and it can empower the Court of Claims to act for it in determining the amount to be adjudicated.

It is quite conceivable that in the event that evidence were lost or destroyed and a citizen could not prove his claim, but it was generally known that there was a moral obligation on the part of the United States to aid him, that Congress would have the power, without its right being questioned by a Court, to determine the value of the moral obligation and to pay it either by direct legislation or by making the Court of Claims its agent to estimate and fix the amount of the moral obligation. So, it is respectfully submitted that there does not seem to be a real basis for refusal, simply because the Court may have to go back three-quarters of a century, or there is no written evidence of intention, and so a recovery could not be allowed by the Court of Claims, acting as the agent or representative of Congress.

6. Finally, the members of the Indian Association are disturbed by what appears from the majority opinion to

be a departure from the rule laid down in *Worcester* v. *Georgia*, 6 Peters 515, and many subsequent cases of this Court, to the effect that a treaty with the Indians should be interpreted according to the understanding of unlettered and inexperienced peoples, rather than the meaning that would be imposed upon a reasonably educated white citizen. It is respectfully submitted that these unlettered Shoshones, when they surrendered rights of way over territory that had been occupied and dominated by them even beyond their memory, under a treaty that was mutually executed by the United States with them, was a recognition of the giving up of something over which they had control. This could not be understood otherwise by them.

CONCLUSION.

The Indian Association is more than usually disturbed now because it is attempting to assist in settling once for all the claims of the respective tribes against the United States, and it fears that the language of the majority opinions here expressed may by analogy throw grave clouds upon the titles of these respective tribes and set up new tests that may have the effect of excluding recovery if such tests have to be met.

It is respectfully submitted that the instant case is a very simple one, for if title is involved, then we have the recognition by Congress in the Treaty, supported by all of the actions of administrative and executive officers of the Government, leading up to the Treaty. If, however, title is not involved, but only area and value, then the case is even more simple, because all of the determining factors are found in the Box Elder Treaty and its associate treaties except one, and that is the value of this property. In times past the Court of Claims has put values on Indian lands in the west, where it had no more evidence as to value than it has now. Therefore, it would seem that a judgment in

dollars could be found easily, and reasonably justified by the Court of Claims.

Respectfully submitted,

HUSTON THOMPSON,
General Counsel for The National Congress of American Indians.

Dated at Washington, D. C.,
April 5, 1945.